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Nos. 02-1096, 02-1097

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

THE ESTATE OF TOMMY SMITH, *et al.*,

Respondents.

FORD MOTOR COMPANY,

Petitioner,

v.

JUAN RAMON ROMO, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY & COURT OF APPEAL OF CALIFORNIA, FIFTH APPELLATE DISTRICT

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae National Association of Independent Insurers ("NAII") is a national trade association of over 700 member companies dedicated to expanding the choices available to the insurance-buying public, reducing the costs of insurance to its policyholders, and promoting competition. For over 50 years, NAII has represented the interests of property and casualty insurance companies and their customers throughout the United States. *Amicus curiae* State Farm Mutual Automobile Insurance Company is one of the largest automobile insurance companies in the United States and does business nationwide.

Amici believe that this brief will assist the Court by providing perspective on special issues regarding punitive damages that confront national businesses that engage in consumer transactions. Claims for punitive damages against insurance companies, manufacturers of mass produced goods, and other such consumer-oriented businesses tend to produce arbitrary and often excessive punitive damages awards. The imposition of punitive damages against such corporate defendants raises special concerns that do not arise in the context of litigation over single transactions between individuals.

This is at least partly because punitive damages law has historically developed in the context of common law tort actions between individuals. Punitive damages, as one commentator put it, developed "largely as a punishment and deterrent for trespassers, oxen thieves and other such human malefactors."[2] As a result, when the principles of common law punitive damages are applied to the conduct and decision-making processes of a large modern business, punitive damages may be awarded that are excessive as a matter of due process or where due process forbids any punishment

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[1] Counsel for a party did not author this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of the brief. The parties have consented to the filing of this brief, and copies of those consents have been lodged with the Court.

[2] David G. Owen, *Problems in Assessing Punitive Damages against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 15 (1982).

at all. The problem is compounded, in some cases, by juror bias against large out-of-state businesses and manufacturers.

In particular, the assessment of reprehensibility – the most important of the constitutional guideposts set forth by this Court for determining whether a punitive award is excessive – presents difficulties in both products liability and insurance litigation. For example, the complex decision-making that results in the final design of a product may reflect a series of necessary and reasonable risk-utility determinations that, in subsequent evaluations, juries and judges find all too easy to characterize as "reprehensible." The affirmance of the massive punitive damages awards in *Romo* and *Smith* illustrates the arbitrary nature of punitive awards against large corporate defendants and the lack of coherent standards for measuring the "reprehensibility" of corporate conduct.

The *Romo* and *Smith* cases raise constitutional punitive damages issues that are of substantial importance not only to manufacturers, but also to insurance companies and other companies that deal with consumers. In this brief, *amici* address an issue of particular concern to the insurance industry, namely, the constitutionality of a punitive damages award where (as in *Romo* and *Smith*) a corporate defendant has complied with industry standards and government regulations and where there is ground for reasonable disagreement concerning the propriety of the corporate conduct at issue.

SUMMARY OF ARGUMENT

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court held that the Due Process Clause of the United States Constitution imposes constraints on punitive damage awards. The Court identified the degree of reprehensibility of the defendant's conduct as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *BMW*, 517 U.S. at 575. Accordingly, it is necessary as a constitutional matter that the determination of the degree of reprehensibility of a defendant's conduct be based on an analysis that produces fair and accurate results.

The analyses of reprehensibility by the California appellate court in *Romo* and by the Kentucky Supreme Court in *Smith* fall far short of the constitutionally required level of

fairness and accuracy. Both courts improperly discounted defendant Ford Motor Company's compliance with government regulations and industry standards and ignored the realities of complex corporate decision-making. In particular, in making product design decisions, manufacturers such as Ford necessarily and properly consider not only a variety of potential safety issues, but also other design concerns such as marketability, ease of operation, durability, and cost.

In many cases where punitive damages are imposed, including *Romo* and *Smith,* the corporate defendant had an arguable basis for believing that its chosen course of conduct was reasonable and conformed to its legal obligations towards consumers – even if a particular corporate decision turned out after the fact to have been wrong or unwise such that compensatory damages were in order for the affected consumer. Most importantly, where a corporation – whether a product manufacturer, an insurance company or other institutional defendant – has complied with government regulations or industry standards, that compliance should generally be found to establish a basis for "reasonable disagreement" as to the propriety of the defendant's conduct. "Reasonable disagreement" should negate or at least substantially lessen reprehensibility and thus weigh heavily against the imposition of punitive damages.

In the context of insurance litigation, some courts have applied the "reasonable disagreement" standard to bar punitive damages in cases where, despite the fact that a jury determines that an insurance company was incorrect in denying a claim or in interpreting the insurance contract, there was a genuine dispute or reasonable disagreement about the propriety of the insurance company's conduct. The "reasonable disagreement" standard provides a fairer and more accurate analytical basis for determining a corporate defendant's "reprehensibility" under *BMW* than the factors used in traditional punitive damages law to assess individual conduct. The use of the traditional factors with regard to corporate conduct often merely encourages anti-corporate biases on the part of judges and juries and results in arbitrary, excessive and unconstitutional punishment of corporate defendants by judges and juries in civil cases.

Amici respectfully submit that application of the "reasonable disagreement" standard in assessing the nature of a corporate defendant's conduct would help alleviate the constitutional problems raised by punitive awards such as those in *Romo* and *Smith*. Certiorari should therefore be granted to clarify the due process constraints on punitive damages and the application of the *BMW* reprehensibility guidepost where a corporate defendant's compliance with government regulations or industry standards creates "reasonable disagreement" as to the propriety of the defendant's conduct.

ARGUMENT

I. Where There Is Reasonable Disagreement as to the Propriety of the Defendant's Conduct, the Imposition of Punitive Damages Raises Significant Due Process Concerns

In *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 490 (1915), this Court set forth the basic principle that where a corporate defendant is justified in believing that a certain course of business conduct is reasonable, the infliction of punishment for that conduct "depart[s] from the fundamental principles of justice embraced in the recognized conception of due process of law." In *Danaher*, this Court set aside a $6,300 statutory penalty awarded to a telephone customer against a telephone company that had disconnected the customer's phone service pursuant to an impartially enforced regulation adopted by the company. The Court determined that because the company's regulation could have been declared unreasonable by the Arkansas legislature, but had not been, the company was "well justified in regarding the regulation as reasonable and in acting on that belief" and that imposition of penalties of $6,300 was "so plainly arbitrary and oppressive as to be nothing short of a taking of [the company's] property without due process of law." *Id.* at 490-91.

Although *Danaher* involved a statutory penalty, the relevance of the due process principle set forth in *Danaher* to punitive damages and the continuing vitality of that principle are demonstrated by this Court's decision in *BMW*. In overturning the punitive damages imposed on defendant BMW, this Court emphasized that BMW had a good faith basis to believe that it was complying with its legal obligations and

that its conduct was not tortious, let alone punishable:

> This [requirement that fraud requires a material misrepresentation or omission] invites line-drawing of just the sort engaged in by States with disclosure statutes and by BMW. We do not think it can be disputed that there may exist minor imperfections in the finish of a new car that can be repaired (or indeed, left unrepaired) without materially affecting the car's value. There is no evidence that BMW acted in bad faith when it sought to establish the appropriate line between presumptively minor damage and damage requiring disclosure to purchasers. For this purpose, BMW could reasonably rely on state disclosure statutes for guidance. 517 U.S. at 579.

The due process principle recognized in *Danaher* has been formulated by some courts and commentators as the "reasonable disagreement" principle, or the "genuine dispute" principle. *See, e.g.*, Dorsey D. Ellis, Jr., *Fairness & Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 22-23 (1982) (for purposes of punitive damages, reckless conduct should be "narrowly defined to exclude reasonable disagreement over the relative danger and utility of an act"). In insurance claims litigation, there was early judicial recognition that where an insurance company has an arguable basis for denying a claim or for other challenged conduct, no punitive damages are warranted as a matter of law, even if a jury later disagrees with the insurance company's assessment of its obligations under the insurance policy. *See, e.g., Mack & Co. v. Lancashire Ins. Co.*, 4 F. 59, 63 (D. Mo. 1880) (to recover damages beyond the value of their destroyed property for vexatious delay in the payment of a policy, plaintiffs must establish that defendants had no reasonable ground for contesting either the validity or the amount of the claim).

Some more recent decisions in insurance cases have also applied the "reasonable disagreement" standard to constrain the imposition of punitive damages for corporate conduct that is determined after-the-fact to be tortious, where, as in *Danaher*, the company was "justified in regarding [its conduct] as reasonable." *Danaher*, 238 U.S. at 490. While these insurance cases apply the "reasonable disagreement" standard

as a matter of state common law, their analysis has constitutional relevance to the due process limits on punitive damages. For example, in *Erie Insurance Co. v. Hickman*, 622 N.E.2d 515, 520-523 (Ind. 1993), the Indiana Supreme Court determined that an award of punitive damages against the defendant insurance company could not be supported where there was probative evidence that the insurance adjuster had based her denial of the plaintiff's uninsured motorist claim on police reports and other "sources of information upon which the adjuster had a right to rely." The court explained that "just as a jury's determination that a claim was, in retrospect, incorrectly denied is not sufficient to establish a breach of the duty to exercise good faith, proof that a tort [breach of the duty of good faith] was committed is not sufficient to establish the right to punitive damages." *Id.* at 520.

The Mississippi Supreme Court has established a similar rule for distinguishing a denial of an insurance claim that was later determined to breach the insurance contract from the denial of an insurance claim that also merited punitive damages. *See Jenkins v. Ohio Cas. Ins. Co.*, 794 So. 2d 228, 232-33 (Miss. 2001). In *Jenkins*, the court held that punitive damages are improper unless the insurer both lacked an arguable basis for denying the claim, and committed a wilful or malicious wrong or acted with gross and reckless disregard. *Id.* The court concluded that these questions are in the first instance questions of law to be decided by the trial judge. *Id.* at 233; *see also Manis v. Hartford Fire Ins. Co.*, 681 P.2d 760, 762 (Okla. 1984) (insurer's withholding of payment of claim could not lead to imposition of punitive damages where there was a "legitimate dispute" regarding evidence of arson).[3]

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[3] *See also Moffet v. Kansas City Fire & Marine Ins. Co.*, 244 P.2d 228, 233 (Kan. 1952) (holding that the "[m]ere refusal to pay insurance cannot constitute wanton or malicious conduct when, as here, an actual controversy exists with respect to liability on the policy. If this were not the rule, punitive or exemplary damages could be recovered in every action involving a refusal to pay an insurance policy."); *Jackson Nat'l Life Ins. Co. v. Receconi*, 827 P.2d 118, 134 (N.M. 1992) (finding insufficient support for punitive damages where refusal to pay on a claim for failure of condition precedent in the application was not frivolous or unfounded; "unfounded" interpreted to mean "an utter or total lack of foundation for

(continued...)

The "reasonable disagreement" standard has also been used in products liability and other types of cases in drawing the line between compensatory damages and punitive damages, and ensuring that punitive damages are not the automatic consequence of liability in tort. *See, e.g., Barber v. Nabors Drilling, U.S.A., Inc.*, 130 F.3d 702, 710 (5th Cir. 1997) (in ADA case, reversing punitive award where there was a "good faith dispute" as to propriety of employer's conduct). As shown below, the reasonable disagreement standard helps to prevent arbitrary awards of punitive damages and awards of punitive damages that punish socially useful behavior on the part of corporate defendants.

II. The "Reasonable Disagreement" Standard Should Be Applied in Assessing Reprehensibility under *BMW*

In *BMW*, as in *Danaher*, the defendant was faced with the need to determine *ex ante* whether a specific course of conduct would conform to its legal obligations, in the absence of a particular statute or judicial decision addressing that conduct. As noted above, in *BMW*, 517 U.S. at 579, the defendant car manufacturer in deciding upon a course of conduct in Alabama looked to regulations and statutes in other states and concluded that it would be reasonable to conform its conduct to the strictest of those statutes. Many other companies, including product manufacturers and insurance companies, are confronted by the same need to determine *ex ante* whether a course of conduct will conform to their legal obligations. As *Romo* and *Smith* illustrate, makers of potentially dangerous, yet necessary and useful products, such as automobiles and trucks, are confronted with this problem in a par-

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[3] (...continued)
an assertion of nonliability – an arbitrary or baseless refusal to pay, lacking any arguable support in the wording of the insurance policy or the circumstances surrounding the claim."); *Hoskins v. Aetna Life Ins. Co.*, 452 N.E.2d 1315, 1320 (Ohio 1983) ("[M]ere refusal to pay insurance is not, in itself, conclusive of bad faith. But when an insurer insists that it was justified in refusing to pay a claim of its insured because it believed there was no coverage of the claim, . . . such belief may not be an arbitrary or capricious one. The conduct of the insurer must be based on circumstances that furnish reasonable justification therefor" (omission in original) (citation omitted)).

ticularly acute form. Such manufacturers make product design decisions facing limits of knowledge, the necessity of trade offs in safety, the need to measure the cost of safety features or redesign of a product against the level of risk, and the need to produce a product that people can afford to buy. To ensure some level of accuracy, the assessment of the level of a defendant's reprehensibility in manufacturing a product should be based upon principles that take into account the realities of designing and marketing a product.

An assessment of reprehensibility that takes into account the "reasonable disagreement" standard leads to more reliable results in the determination of the amount, if any, of punitive damages that should be awarded. In assessing the behavior of corporate defendants under the "reasonable disagreement" principle, courts should look to whether the company's conduct complies with government standards or regulations and industry standards. In particular, where government regulations or standards govern a defendant's conduct, as is very often the case both with insurance companies and with car and truck manufacturers such as Ford, a defendant's compliance with such standards and regulations should be held (at a minimum) to create a presumption that there are grounds for reasonable disagreement as to whether the defendant acted reprehensibly in adopting that course of conduct. *See* Point III *infra*. In the case of manufacturers, courts should also look to whether there is room for reasonable disagreement as to the propriety of the design decisions, safety trade-offs and risk-utility calculations made by the company, such that the company may have reasonably believed that its conduct complied with its legal obligations toward consumers.

Some courts have persuasively applied such principles. For example, in *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995), the court vacated a $2 million punitive award that was based upon Honda's failure to incorporate leg guards on its motorcycles. The court held that Honda's "marketing its products in the same design of every motorcycle marketed in the world to the general public" was not as a matter of law so extreme or outrageous as to justify punitive damages. *Id.* at 1316. The court also noted that "[a]lthough certain studies indicate that leg guards are effective, no government in the world has ever required them," *id.*, and that

there was "a genuine dispute in the scientific community" as to the efficacy and desirability of leg guards. *Id.* at 1317.

In *Loitz v. Remington Arms Co.*, 563 N.E.2d 397 (Ill. 1990), in which the plaintiff was injured when the barrel of his gun exploded, the Illinois Supreme Court reversed a $1.6 million punitive award against the gun manufacturer. In contrast to the California court in *Romo*, the Illinois Supreme Court took a reasoned view of the role of prior accidents and litigation in showing the manufacturer's purported knowledge of dangers posed by its product. The Illinois court rejected the appellate court's view that the "detailed testimony about prior, similar occurrences which were made known to defendant before plaintiff's gun exploded" supported the punitive award, explaining:

> The 94 prior accidents represent about 0.003% of Remington's production of more than 3 million Model 1100 barrels during the span of time in question. The prior accidents must be considered not only in relation to the number of barrels produced by Remington during that period, but also in relation to the estimated number of times those guns would have been used. Although the latter number cannot be known with any precision, the plaintiff's trial testimony demonstrates that he had used his own Model 1100 shotgun literally thousands of times. *Loitz*, 563 N.E.2d at 404.

The Illinois Supreme Court in *Loitz* also rejected the appellate court's reliance upon the manufacturer's "inaction in the face of [an] earlier adverse decision" as an aggravating circumstance meriting punitive damages, stating:

> While it is true that Remington was made aware of [plaintiff's expert's] opinion during the course of the prior case, it cannot be said that Remington was automatically required to embrace Dr. Levinson's view as its own. The evidence presented at trial indicated that Remington began producing the Model 1100 shotgun in 1963 following extensive research into its design. Remington employs its own engineers and metallurgists and relies on their expertise. Various tests are performed at different stages of the

> manufacturing process to ensure the safety and quality of its shotguns. Remington's evidence demonstrated, however, that its manufacturing and testing procedures are not able to prevent every barrel explosion or rupture . . . . *Id.* at 405.

In *Hillrichs v. Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994), the Iowa Supreme Court invoked the reasonable disagreement principle in upholding a directed verdict for the defendant on punitive damages. In *Hillrichs*, the plaintiff attempted to clear a plugged cornpicker while the machine was running and caught his hand in the rollers. *Id.* at 96. The plaintiff put on evidence that the defendant "knew, at the time it manufactured the husking bed, that farmers often attempted to unplug the husking rollers while they were operating" and that the defendant "could have installed an emergency stop device for less than $50." *Id.* at 97. The defendant's evidence showed that when its

> engineers decided not to install emergency stop devices on the . . . husker apparatus, they based their decision on the so called 'dependency hypothesis,' the theory that the product as designed would discourage farmers from making contact with the roller bed and that the plaintiff's proposed device would invite farmers to unreasonably depend on it despite the dangerousness of the husking roller bed.

Id. at 100. In upholding a directed verdict for the defendant on the issue of punitive damages, the Iowa court stated that "an award of punitive damages is inappropriate when room exists for reasonable disagreement over the relative risks and utilities of the conduct and device at issue." *Id.* (citing *Burke v. Deere & Co.*, 6 F.3d 497, 511 (8th Cir. 1993)).

In the decisions discussed above, certain recurring themes emerge from the courts' detailed examination of the corporate conduct in question. Those themes – including compliance with government regulations and the recognition of the multiple competing considerations that go into corporate decision-making – can be brought together under the general rubric of the "reasonable disagreement" standard. As shown more fully below, use of that standard in assessing a corporation's conduct under the *BMW* reprehensibility guide-

post is critical to reaching a reasonably accurate assessment of whether, as a matter of due process, punitive damages are warranted at all, and, if so, in what amount.

III. Under the "Reasonable Disagreement" Standard, a Defendant's Adherence to Government and Industry Standards Should Weigh Heavily Against Punitive Damages

In both *Romo* and *Smith*, the courts improperly discounted the fact that Ford had complied with industry and government standards. In *Romo*, as the California court acknowledged, the evidence showed that the roof strength of plaintiffs' vehicle, a 1978 Bronco, "far exceeded the passenger car standard that existed" at the time the Bronco was manufactured. (*Romo* Pet. App. at 28a.) The court acknowledged that the Bronco's roof even exceeded the "current standard" for SUVs, but dismissed this as "merely coincidental." (*Id.* at 28a-29a.) Likewise, the court gave no weight to the fact that "other auto manufacturers also used fiberglass roofs on contemporaneous fiberglass utility vehicles." (*Id.* at 36a.) In *Smith*, the plaintiff's expert admitted that "all four major American automobile manufacturers equipped their vehicles with automatic transmissions having the same design as the transmission installed by Ford" in the seventeen-year-old truck used by Tommy Smith. (*Smith* Pet. App. 41a (Cooper, J., dissenting)). Moreover, the NHTSA had concluded after an extensive investigation that "vehicles equipped with a transmission of the type installed in [the] Ford F-250 pickup truck [used by Smith] were not sufficiently unsafe to warrant recall." *Id.* at 53a.

Contrary to the decisions in *Smith* and *Romo*, compliance by a corporate defendant with government and industry standards creates a ground for "reasonable disagreement" and should weigh heavily against the imposition of punitive damages. When government agencies or an entire industry have reached the same conclusion as the defendant, it is apparent that reasonable people could reach that conclusion, and the degree of reprehensibility under *BMW* – if reprehensibility exists at all – is necessarily very low. Thus, for example, where a manufacturer defendant has made a product in compliance with government standards, such compliance "would

be admissible evidence tending to negate charges of negligent and defective design" and should "presumably weigh against an award of punitive damages." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 893 (2000) (Stevens, J., dissenting). Indeed, Professors Prosser and Keeton have stated that "compliance with a statutory standard should bar liability for punitive damages." W. Page Keeton, *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 233 & n.41 (5th ed. 1984). *See also Richards v. Michelin Tire Corp.*, 21 F.3d 1048 (11th Cir. 1994) (punitive damages prohibited where defendant complied with federal safety standards).[4]

As Professor David Owen has explained:

> Many government standards . . . are adopted with studied care, and some are placed close to the line of feasible technology; others are set in a wide gray area where the difficulties of defining defectiveness (the 'proper' mix of safety and its tradeoffs) are especially great. In theses circumstances, particularly if many in the industry have come to treat the provision as the proper safety norm, proof of compliance with the regulation or statute ordinarily should be deemed to be conclusive proof of good faith and hence a conclusive defense to a punitive damages claim.

Owen, *supra*, at 41-42. *See also Welch v. Gen Motors Corp.*, 949 F. Supp. 843 (N.D. Ga. 1996) (punitive damages not warranted where automobile's braking system and instrument panel met applicable federal regulations); *Sloman v. Tambrands, Inc.*, 841 F. Supp. 699 (D. Md. 1993) (defendant who complied with federal regulation regarding product alert did not act with malice and therefore was not liable for punitive damages); *Chrysler Corp. v. Wolmer*, 499 So. 2d 823 (Fla. 1986) (award of punitive damages is unjust where de-

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[4] Some states, by statute, bar punitive damages where the alleged wrongdoer has complied with existing government regulations. *See, e.g.*, Ohio Rev. Code Ann. § 2307.80(C) (the manufacturer of a drug will not be liable for punitive damages in a product liability claim if the drug that allegedly caused the harm was manufactured and labeled in relevant and material respects in accordance with the terms of an approval or license issued by the FDA); Or. Rev. Stat. § 30.927.

fendant had complied with requirements of National Traffic Motor Safety Act regarding fuel system integrity).

Likewise, while adherence to industry standards is not always a defense to liability in a negligence action, *see, e.g.*, *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932), it constitutes powerful evidence that the conduct at issue is not so universally condemnable as to warrant punitive damages. In the insurance context, compliance with industry standards has been held to negate the culpable state of mind required for punitive damages. *See Hibler v. Conseco*, 744 N.E.2d 1012, 1022 (Ind. Ct. App. 2001) (conduct understood by insurer to be "an accepted practice within the industry" did not support "culpable state of mind" warranting punitive damages); *cf. Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1275 (Colo. 1985) (bad faith claim against insurer requires "proof of the standards of conduct in the industry"). In products liability cases, compliance with industry standards has been held to "show[] a reasonable disagreement over the relative risks and utilities" of a defendant's conduct in designing and manufacturing a product. *See Mercer v. Pittway Corp.*, 616 N.W.2d 602, 618 (Iowa 2000) (reversing punitive damages; defendant manufacturer's adoption of Underwriters Laboratory standard for testing and performance of smoke detectors showed that there existed grounds for "reasonable disagreement"). As one commentator has stated, "[r]arely will an entire industry act with flagrant impropriety against the health and safety of the consuming public, and running with the pack in general should shield a manufacturer from later punishment for conforming to the norm." Owen, *supra*, at 40-41. Accordingly, compliance with industry custom "has been accorded substantial weight in the punitive damages context." *Id.* at 40. *See also, e.g., Drabik v. Stanley-Bostich, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) ("[c]ompliance with industry standard and custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind"); *Alley v. Gubser Dev. Co.*, 785 F.2d 849, 856 (10th Cir. 1986) (reversing denial of directed verdict on punitive damages where defendant's conduct was consistent with industry practice).

Issues regarding compliance with governmental and industry standards repeatedly arise in the insurance context. In

each of the fifty states, insurance companies are subject to comprehensive laws and regulations that govern their obligations to policyholders. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 733 (1996) (Kennedy, J., concurring) ("States, as a matter of tradition and express federal consent, . . . maintain[] precise and detailed regulatory schemes for the insurance industry."). Accordingly, *amici* urge that under *Danaher* and *BMW* a defendant's compliance with government regulations and industry standards should, as a matter of due process and fundamental fairness, weigh strongly against the imposition of punitive damages and should certainly preclude a punitive award of millions of dollars, such as the awards upheld in *Smith* and *Romo*.

Such compliance, whether by a manufacturer or insurance company or other corporate defendant, provides a clear marker for distinguishing between conduct that is merely tortious and conduct that merits punitive damages. By discounting evidence of compliance with government and industry standards, the courts in *Smith* and *Romo* contravened the "[e]lementary notions of fairness enshrined in our constitutional jurisprudence" that "dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. Certiorari should be granted to clarify the due process constraints on punitive damages and the application of the *BMW* reprehensibility guidepost where a corporate defendant's compliance with regulations or industry standards creates "reasonable disagreement" as to the propriety of the defendant's conduct.

IV. Using Traditional Factors To Assess the Reprehensibility of Large Institutional or Corporate Defendants Produces Skewed Results and Arbitrary Punitive Awards

The need for this Court's guidance in the application of the *BMW* reprehensibility guidepost to conduct by businesses and manufacturers is demonstrated by the manifest shortcomings of the analysis provided by the courts in *Smith* and *Romo*. Those courts attempted to analyze reprehensibility by reference to traditional factors such as knowledge, recklessness, repeated conduct, physical injury and profit motivation.

Such factors, having been developed in tort cases between individuals, often do not produce constitutionally acceptable assessments of the conduct of corporate defendants. Rather, the traditional analysis does nothing to curb biases against large out-of-state corporations, encourages misunderstanding and punishment of socially beneficial behavior and produces punitive awards that are unfair, arbitrary and excessive.

The traditional reprehensibility factors are, almost by definition, present in products liability cases such as *Romo* and *Smith*. For example, the traditional "scale" of reprehensibility finds conduct that results in physical injury or death more reprehensible than conduct that results merely in economic injury. *See BMW*, 517 U.S. at 576. In products liability cases, the use of this factor automatically puts the defendant high on the reprehensibility scale. Likewise, a corporation that manufactures cars or other products whose use carries some inherent danger will likely have knowledge of the statistical likelihood (or certainty) that injuries or deaths will result from the use of its product. In litigation, such knowledge will inevitably be characterized by plaintiff's counsel as a knowing or reckless indifference to the safety of a plaintiff who is later injured by the product, again automatically placing the defendant corporation high on the reprehensibility scale. *See* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stanford L. Rev. 547, 574 (2000). Moreover, because corporations are in business to make money, the alleged motive of the corporate defendant will always be greed. *See id.* at 566. In products liability cases, these factors will likely be present even where "reasonable disagreement" existed regarding the risks and utilities of the defendant's conduct. Therefore, in assessing reprehensibility in products liability cases, it is important to give substantial weight to the "reasonable disagreement" principle.

The analysis provided by the California Court of Appeal in *Romo* exemplifies the problems with traditional reprehensibility assessment in products liability cases. The court began its constitutional reprehensibility analysis with the proposition that because deaths had occurred in the automobile accident at issue, "the award here cannot be compared to cases 'involving a business fraud resulting only in economic harm.'" (*Romo* Pet. App. 38a.) The court determined

that Ford's conduct involving "mass production and marketing" of a product "purely for defendant's economic betterment" (*Romo* Pet. App. 38a) was "despicable" and, thus, grossly reprehensible because Ford marketed a product that "could kill people." (*Romo* Pet. App. 25a-26a.) In *Smith*, likewise, the Supreme Court of Kentucky found Ford's conduct to be substantially reprehensible because Ford continued to market its trucks "after Ford knew of the dangerous propensity of its transmission" (*Smith* Pet. App. 17a) – despite the fact that the NHTSA had decided not to recall the vehicles and that all four major American manufacturers used the same transmission design.

Jurors' sympathies and cognitive biases compound the risk that punitive awards in products liability cases will be skewed. Where injuries are severe, juries may be reluctant to blame the injured, preferring in the case of a car accident, for example, to blame the car rather than the driver. Furthermore, it is easy for plaintiff's lawyers to demonize large, out-of-state corporations, and jurors' "natural sympathy for a seriously injured person" may be "reinforced when the defendant is a manufacturer, for many persons are hostile toward major institutions in general and 'big business' in particular." Owen, *supra*, at 12.[5] Thus, it is not surprising that, as jury research has shown, juries tend to punish corporations simply for having conducted a risk analysis. *See* Viscusi, *supra*, at 559 (mock jury research showed that "[u]ndertaking a benefit-cost analysis of risk does not help the company, but instead boosts the punitive damages awarded by 47%."). In addition, what a jury may view as a significant number of prior, repeated incidents evidencing knowledge and recklessness warranting a

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[5] *See also* Ellis, *supra*, at 42 ("In the emotionally charged context of a civil trial, which lacks the procedural safeguards of a criminal proceeding, where the jury is invited to assess punitive damages with little guidance and less constraint, decisions will be affected by latent biases or redistributional inclinations. If juries dislike or do not understand cost-benefit analyses, [or] distrust corporations, . . . those factors are likely to bias their decisions."). Notably, in his dissenting opinion in *Smith*, Justice Cooper of the Kentucky Supreme Court characterized the punitive award in that case as "an outrageous verdict" by a "runaway jury" that would "redistribute the wealth of an out-of-state corporation with requisite deep pockets." (*Smith* Pet. App. 32a.)

large punitive award, may in fact involve only a tiny percentage of the numbers of products sold and being used uneventfully by millions of consumers. *See, e.g.*, *Loitz*, 563 N.E.2d at 404 (vacating punitive award; stating that 94 prior accidents represented only 0.003% of 3 million gun barrels).

The weighing of costs and benefits or risk and utility by a manufacturer in making design decisions is desirable, socially beneficial conduct that should be encouraged, not punished. Viscusi, *supra*, at 550 ("we want corporations to think about risks in a systematic manner."). Basing punitive damages liability on the defendant's knowledge through cost-benefit analysis of the risk of injury has a "perverse effect on incentives," reducing the "resources committed to ascertaining the relative harm that would result from alternate product designs and to exploring means of reducing expected loss," thus, "deter[ring] the very activities that efficient liability rules promote." Ellis, *supra*, at 50.[6] *See also In re Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001) (noting danger of deterring "good conduct that risks being misunderstood as bad, or that will look bad in retrospect").

Many competing factors are considered in designing a product, and while safety is important, manufacturers of products "must also consider elements such as marketability, appearance, ease of operation, durability, freedom from maintenance or repair, ease of manufacture, and economics of materials and labor." Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Prod. Liab. Litig.*, 74 Ky. L.J. 1, 88-89 (1985). Ultimate safety is not economically feasible, either from the manufacturer's viewpoint or from the viewpoint of the consuming public. Cars cannot be manufactured like tanks, and safety trade-offs, although

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[6] Likewise, in the insurance context, the too ready imposition of punitive damages may result in deterring reasonable investigation of invalid or fraudulent claims. *See, e.g., Savio*, 706 P.2d at 1275; Alan O. Sykes, *"Bad Faith" Breach of Contract by First-Party Insurers*, 25 J. Legal Stud. 405, 434-35 (1996) (noting "rampant" insurance fraud and stating: "[i]f reasonable efforts to reduce fraud can become 'bad faith' down the road, . . . insurers may simply give up on them"). The "reasonable disagreement" standard helps strike a balance between competing social considerations in both the products liability and the insurance contexts.

not palatable to juries, are necessary. The costs of avoiding all risk of harm are "potentially infinite," and requiring a manufacturer to bear them or face a huge punitive award will simply mean that "society would lose the benefit of the productive activity." *Exxon Valdez*, 270 F.3d at 1244.

Problems of hindsight create a further potential for excessive punitive awards, when juries and courts examine a manufacturer's risk-utility decisions. Juries and courts, assessing a defendant's reprehensibility after the fact of an accident, do not necessarily "compare expected benefits and costs based on the state of information before the accident." Viscusi, *supra*, at 563.[7] Rather, "jurors may compare the enormous cost to the victim with the relatively negligible cost of the safety improvement." *Id.* However, although the cost of a single "fix" for each car or other product may seem low, "at the time of design, the fix was merely one of a great many options considered for inclusion in the total design mix, and . . . human injury from any one was at most at that time only a foreseeable risk." Owen, *supra*, at 35. With respect to car design in particular, there are "hundreds of design changes that can be made to enhance the safety of [a] vehicle . . . ranging in cost per unit from pennies to hundreds of dollars. Although the cost of any one change may be small in isolation, all [that can be] fairly ask[ed] of management and its engineers in the punitive damages context is that safety considerations not be deliberately excluded or shunted far to the rear in deciding on the total design mix involved." *Id.* at 34.

Moreover, cost-benefit analysis, by its very nature, produces "bad" documents – that is, documents that acknowledge the existence of safety risks. In fact, "the more a manufacturer is truly concerned about its product's safety, the more

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[7] Empirical jury research confirms the serious effect of hindsight bias on jury determinations of punitive damages. *See* Cass R. Sunstein, *et al.*, *Punitive Damages: How Juries Decide* 96-107, 211, 222 (2002). Hindsight bias exists in insurance litigation as well. *See, e.g.*, James M. Fischer, *Should Advice of Counsel Constitute a Defense for Insurer Bad Faith?*, 72 Tex. L. Rev. 1447, 1485 n.90 (1994) ("Hindsight bias reflects the tendency of decisionmakers to find that what did occur should have been foreseen . . . . In an insurance bad faith case involving an excess verdict, the fact of the verdict influences the decisionmaker's perception of the probability of the excess verdict.").

it will encourage self-criticism and 'negative' analyses of the product within the company." Owen, *supra*, at 17.[8] Thus, "in the documentary background of most inherently dangerous products will be some fair number expressing concern over many of the significant choices in the design process." *Id.* The result in later litigation is that "[a] skillful plaintiff's lawyer will often be able to find and string together a series of such documents, plucked from context among the thousands or millions in the company's files, that may make the manufacturer look particularly insensitive to consumer safety and more concerned about cutting costs." *Id.* at 19.

Accordingly, in evaluating such documents for purposes of punitive damages, it is important that courts be aware of the realities of the design process and, in particular, the reality that manufacturers of products such as automobiles "must design them in many different ways they know with virtual certainty will result in harm or death at some time to a certain number of unfortunate, statistical persons." *Id.* at 15. In *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 825 (Fla. 1986), the Florida Supreme Court distinguished such knowledge from the knowledge of an asbestos manufacturer. In assessing the "reprehensibility" of a car maker's design and placement of a fuel tank, the court emphatically rejected the proposition that the car manufacturer could be equated to an asbestos manufacturer who had been "shown to have knowledge that its product is inherently dangerous to persons or property and that its continued use is likely to cause injury or death, but nevertheless continues to market the product . . . ." *Id.* (refusing to follow *Johns-Manville Sales Corp. v. Janssens*, 463 So. 2d 242 (Fla. Dist. Ct. App. 1984)). The Florida Supreme Court held that the *Johns-Manville* "standard [was]

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[8] In *Smith*, in assessing reprehensibility, the Kentucky court stressed a document by a Ford engineer that identified the purported defect in the transmission and purportedly "recommended an alternative." (*Smith* Pet. App. at 14a, *but see id.* at 37a-42a (opining that Ford was entitled to directed verdict on issues of causation and defect) (Cooper, J., dissenting)). Notably, that document recommended not an existing alternative but that "design and development be directed toward" an alternative. (*Id.* at 14a n.24.) Likewise, the California court relied upon various corporate documents, including a "corporate memo" apparently advocating consideration of a stronger roof strength standard. (*Romo* Pet. App. at 26a.)

clearly erroneous when applied to a claim that a motor vehicle was insufficiently crashworthy when precautions had been taken to insure its crashworthiness." *Id.* at 826.

The Florida Supreme Court's opinion in *Wolmer* stands in stark contrast to the opinions of the courts in *Smith* and *Romo*. Indeed, in upholding punitive damages against Ford in the *Smith* case, the Kentucky Supreme Court chose to follow a case in which punitive damages were assessed against an asbestos manufacturer and in which the Kentucky Supreme Court had held that asbestos defendants were not insulated from liability by industry practice "just because every member of that industry was manufacturing and distributing a product known to be inherently dangerous." (*Smith* Pet. App. at 17a & n.38.) The Kentucky court ignored Kentucky precedent holding the manufacturer of an auger not liable even for compensatory damages where the auger "conformed to the design as to safety developed by the industry," despite the "occurrence of other injuries." *See Jones v. Hutchinson Mfg. Inc.*, 502 S.W.2d 66, 70-71 (Ky. App. 1973). The Florida Supreme Court in *Wolmer* was correct, and the Kentucky Supreme Court in *Smith* was wrong. The manufacture of a car or truck conforming to government and/or industry standards cannot rationally be equated to the manufacture of asbestos.

Under the "reasonable disagreement" standard, the fact that a manufacturer has based its design decisions on a risk analysis should weigh against punitive damages, even if a particular design decision turns out to have been wrong or unwise such that compensatory damages for the injured product-user are in order. That conclusion is mandated not only by the "reasonable disagreement" standard, but also by the considerations of due process and fundamental fairness upon which this Court's decision in *BMW* is based. This Court should grant certiorari to clarify the contours of the due process limitations on punitive damages in products liability, insurance, and other cases against corporate defendants.

CONCLUSION

The petitions for certiorari should be granted.

Respectfully Submitted,

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